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Commission on Judicial Performance
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January 14, 2013

VIA FEDEX

Hon. Allan D. Hardcastle, President
California Judges Association
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833-4228

Re: CJA Letter Dated September 24, 2012

Dear Judge Hardcastle:

The commission has carefully considered the proposed rule amendments submitted by the California Judges Association (CJA) with the letter dated September 24, 2012. The commission has had the benefit of input from Judge David M. Rubin and Judge Marie S. Weiner, in meetings with the Director-Chief Counsel in September and with the commission's rules committee in December. In response to CJA's proposals, the commission has determined to circulate for public comment certain rule amendments that the commission believes meet CJA's interests without compromising the commission's mandate to protect the public, maintain public confidence in the integrity and independence of the judiciary, and enforce rigorous standards of judicial conduct. This letter explains the commission's proposed amendments. The commission seeks CJA's comments on the commission's proposed amendments. Comment forms will be posted on the commission's website at www.cjp.ca.gov.

I. CJA Proposed New Rule 111.4 - Grounds for Issuance of Advisory Letters

CJA proposes new rule 111.4, which states grounds for issuance of advisory letters and sets limitations on the issuance of advisory letters based on legal error. The commission proposes adopting that portion of CJA's proposal which reiterates the legal error standard set by the California Supreme Court, but declines to adopt further language in CJA's proposed new rule which would restrict the commission's authority to issue advisory letters to judges who engage in misconduct.

CJA's proposal states, in part, "The commission may issue an advisory letter for a knowing violation of the California Code of Ethics, if supported by clear and convincing evidence." The commission declines to adopt this language because the commission's authority to issue advisory letters is not limited to *knowing* violations of the canons. The authority of the

commission to issue advisory letters to judges who engage in misconduct was upheld in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371. Neither the Supreme Court nor the commission has limited the determination of whether a judge engaged in judicial misconduct to knowing canon violations. As acknowledged by Judge Rubin and Judge Weiner, ignorance of the canons is not a defense to a finding of judicial misconduct.

CJA's proposed new rule also sets forth a standard for the imposition of advisory letters based on legal error. The standard adhered to by the commission in this regard is set by the Supreme Court in *Oberholzer, supra*, 20 Cal.4th at p. 398. To ensure that the judiciary is fully informed of this standard, the commission proposes the following new rule, which would apply to all forms of discipline, not just the advisory letter:

> *Discipline, including an advisory letter, shall not be imposed for mere legal error without more. However, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation and discipline.*

In addition to incorporating this standard, CJA's proposed new rule includes language precluding the commission from issuing advisory letters based on legal error demonstrating misconduct "without additional evidence that the judge acted for an improper purpose." This is far more restrictive than the legal error standard set by the Supreme Court. Bad faith and acting for an improper purpose [purpose other than the faithful discharge of judicial duty] are only two of the six "plus" factors cited in *Oberholzer* as providing grounds for the imposition of discipline based on legal error. Moreover, the Supreme Court held that judges may be disciplined for conduct undertaken in good faith but which nevertheless would appear to an objective observer to be conduct prejudicial to public esteem for the judicial office. (See, e.g., *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092; *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 329-331 [judge's favoritism in appointing counsel constitutes prejudicial misconduct despite lack of clear and convincing evidence of bad faith or that judge made appointments for purposes other than the faithful discharge of his judicial duties]; see also *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 885-886 [judge engaged in prejudicial misconduct for failing to disqualify despite judge's position that he did not have a duty to disqualify]; *Inquiry Concerning Harris* (2005) 49 Cal.4th CJP Supp. 61, 69 [judge violated canon 2A even though the judge may have been acting in good faith].) Accordingly, the commission declines to include in its proposed new rule a requirement that a judge acted for an improper purpose.

II. CJA Proposed Amendment to Rule 111.5 - Correction of Advisory Letters

CJA proposes to amend rule 111.5, which provides for correction of an error of fact or law in an advisory letter, to add that a correction request may be based on "any misstatement contained in the advisory letter." When asked how this differs from an error of law or fact, Judge Rubin and Judge Weiner explained that judges want an opportunity to correct the "tone" of the advisory letter. They would prefer that advisory letters state only the facts and the canon

violation(s) without the use of "adjectives" in discussing the nature or seriousness of the judicial discipline.

Because it was difficult to discuss CJA's issue with the tone of advisory letters without specifics, Judge Rubin and Judge Weiner agreed to furnish examples when they met with the commission's rules committee. No examples have been submitted. Speaking generally, therefore, the commission believes that CJA's suggested limitations on advisory letters would interfere with the commission's discretion to tailor advisory letters based on the facts and circumstances of each case. In *Oberholzer*, the Supreme Court stated, "Advisory letters may range from a mild suggestion to a severe rebuke[.]" (*Oberholzer*, *supra*, 20 Cal.4th at p. 393.) In certain instances where some commission members may have supported issuance of a private admonishment, the majority may vote for an advisory letter, but direct that it be severe. Much of the import and educational value of advisory letters would be diminished if the commission were limited to stating the facts and the canon violations without explanatory statements and discussion of the seriousness of the misconduct, including aggravating and mitigating circumstances.

Judges have the right to review of advisory letters. Rule 111.5 permits a judge to file an application for correction of an error of law or fact in the advisory letters. Judges who do not believe their conduct warrants an advisory letter have the option of seeking a writ from the Supreme Court. Should the judge seek such review, advisory letters which include explanatory statements provide a stronger record for review.

III. CJA Proposed New Rule – Release of Complaint and Investigation Materials During Investigation

The commission has given serious consideration to CJA's proposed new rule that would require the release of all commission investigative records to a judge before a judge responds to any inquiry or investigation letter from the commission. This would force disclosure of the identity of all witnesses, including the complainant (or "whistleblower") while the commission's investigation is still pending. Under current rules, the discovery proposed by CJA is provided upon the institution of formal proceedings. A judge cannot be removed or censured, the highest levels of discipline, absent the initiation of formal proceedings. In addition, unless a judge waives the right to formal proceedings, a judge cannot be publicly or privately admonished. The commission has determined that providing discovery prior to the institution of formal proceedings would severely compromise the commission's investigation of complaints of judicial misconduct and would jeopardize protection of the public.

We have identified only one judicial disciplinary commission in the country, the Alabama Judicial Inquiry Commission, which is required to release all investigative records prior to the filing of formal charges, as proposed by CJA. As discussed below, the expansion of disclosure requirements in Alabama, including the identification of the complainant and all witnesses, has had a substantial chilling effect on the filing of complaints and witness cooperation in the investigation of judicial misconduct. Moreover, neither due process nor principles of fairness dictate the release of all commission investigative records at a point when

charges have not been filed and the judge is not facing a significant impairment of his or her judicial career through censure or removal from office.

Nonetheless, the commission understands the importance of informing the judge of the specifics of the allegations in staff inquiry and preliminary investigation letters. It has been the commission's practice – as set forth in its Policy Declarations – to include as much specificity as possible in its investigation letters, including the location where the conduct occurred, and, if applicable, the case name(s) or identification of the court proceeding(s) in relation to which the alleged conduct occurred, and text or summaries of comments allegedly made by the judge.

In response to CJA's proposal, the commission proposes that its current practice of providing specificity of the allegations in staff inquiry and preliminary investigation letters, as reflected in Policy Declarations 1.3 and 1.5, be incorporated into commission rules, as follows:

Rule 110. Staff Inquiry; Advisory Letter after Staff Inquiry

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(b) (Staff Inquiry Letter) A staff inquiry letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the inquiry concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.

Rule 111. Preliminary Investigation

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(b) (Preliminary Investigation Letter) A preliminary investigation letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the investigation concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.

The commission, however, declines to adopt a rule, as CJA proposes, requiring full discovery at the time a judge is sent a staff inquiry or preliminary investigation letter. This is an issue that has been raised and considered a number of times by the commission as well as the Supreme Court. Commission rules provide for full discovery when formal proceedings are instituted. (Rule 122.) The Supreme Court upheld the commission's discovery rules in the face of a due process challenge in *Oberholzer*, *supra*, 20 Cal.4th at pp. 390-395. The Supreme Court rejected the judge's contention that he was entitled to a hearing and the right to review evidence considered by the commission before the issuance of an advisory letter. The court reasoned that these procedural protections "are of the type more appropriately required whenever action by the

state significantly impairs an individual's freedom to pursue a private occupation," whereas no such significant impairment was at risk with the issuance of an advisory letter. (*Id.* at pp. 392-393.) Under current rules, a judge will not receive an advisory letter or an admonishment without first receiving notice of the nature of the allegations in a staff inquiry or preliminary investigation letter and being afforded an opportunity to respond, and a judge cannot be censured or removed absent the initiation of formal proceedings with the attendant discovery rights. If the preliminary investigation results in a notice of intended private or public admonishment, the judge is entitled to request formal proceedings, at which point the judge is entitled to discovery and a hearing. (Rules 114(c), 116(c).) Thus, as the *Oberholzer* court noted, before the commission can take action which would "significantly impair" the judge's occupation (censure or removal), formal proceedings must be instituted with the attendant right to discovery.

The *Oberholzer* court further observed that the commission's process provided the judge with sufficient notice of the focus of, and evidentiary basis for, the commission's investigation and granted the judge a sufficient opportunity to address the commission's concerns and defend himself against the allegations of misconduct. The court stated, "The Commission thus fulfilled its obligation to inform petitioner of all material facts behind the allegations." (*Id.* at p. 393.) Balancing the judge's interests "in maintaining a judicial career free of the infliction of disciplinary measures and the Commission's interests in the effective and efficient safeguarding of the public from aberrant action by judicial officers," the court concluded that due process did not require the additional protections urged by the judge. (*Id.* at p. 395.)

In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 526-529, the Supreme Court held that the commission's witness confidentiality admonishment does not prevent a judge from conducting reasonable discovery or deny the judge's right to conduct a reasonable defense. The court observed that confidentiality "protects a judge from premature public attention and also protects the witnesses from intimidation. [Citation]." (*Id.* at pp. 527-528.) Further, the court noted that a plethora of rights attach once formal proceedings are instituted. In contrast, during the preliminary investigation, the "judge does not have the right to defend against a proceeding that has not yet been brought." (*Id.* at p. 528.)

CJA has previously conceded that a judge is not entitled to discovery prior to formal proceedings. In a 2004 letter to the Assembly Judiciary Committee concerning proposed legislation authorizing depositions in CJP proceedings, CJA lobbyist Mike Belote noted that due process rights do not attach prior to the filing of formal proceedings citing *Ryan*, and stated: "We agree with the Commission on this point, and are drafting amendments to limit the deposition right to the point when formal charges are filed."

In addition to not being required by due process, principles of fairness do not mandate discovery during investigations. The staff inquiry and preliminary investigation letters provide the judge with sufficient specificity to allow the judge or the judge's counsel to investigate the allegation(s). Information collected by the commission during its investigation – witness interviews, court documents and records – is information available to the judge. This is especially true in California where taxpayer funds are used to subsidize an insurance program that provides counsel free of charge for judges in disciplinary proceedings. The overwhelming

majority of states[1] provide no insurance and no reimbursement to judges for the costs of defending against disciplinary investigations, unless the judge is exonerated. Especially with the assistance of taxpayer-funded counsel during the investigation, there is no need for judges to access the commission's files to respond effectively to an investigation letter.

The commission's discovery rules are consistent with the overwhelming majority of judicial disciplinary commissions in the country. Alabama is the only state we are aware of that requires full discovery in judicial disciplinary proceedings before the filing of formal proceedings.[2] In 2001, Alabama adopted a rule requiring the commission to provide the judge with a copy of the complaint and all materials "of any nature whatsoever" supporting or accompanying the complaint within 21 days of receipt of the complaint. In 2009, the American Bar Association Standing Committee on Professional Discipline sponsored a Report on the Alabama Judicial Discipline System (Report), at the request of the Alabama Supreme Court. The Report noted that the number of complaints filed with the Alabama commission dropped by almost half after 2001, when complaints had to be verified and judges were given the names of complainants, from 279 complaints in 2000 to 141 complaints in 2002. The Report recommended eliminating these discovery requirements with the following pertinent comments:

- "[T]he requirements set forth in these Rules conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the Commission to effectively conduct a proper investigation." (Report, p. 17.)

- "The public must have confidence that the Commission, a judicial branch entity, will consider all information about unethical judges and protect those who provide that information." (Report, p. 18.)

- "This practice [of providing the complaint and additional material], particularly the revelation of the complainant's identity, has a chilling effect on those who may want to file a complaint against a judge. Specific instances were described to the team by a range of interviewees, including but not limited to potential complainants, actual complainants, lawyers and judges." (Report, p. 19.)

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[1] We have identified only one state other than California, Alaska, that provides insurance to their judges statewide free of cost.

[2] Vermont and New Hampshire require that judges receive copies of complaints filed against them prior to the filing of formal charges. However, in those jurisdictions, complaints or summaries of complaints become public after the judicial disciplinary commission's final action. The Arizona Commission on Judicial Conduct has discretionary authority to disclose a complaint to the judge and the judge's response to the complainant at any time; as a general rule, complaints against judges are disclosed to the public following final disposition. None of these states require full discovery, including witness statements, prior to the filing of formal charges as proposed by CJA.

> • "The mere possibility of retaliation against a complainant by a judge, however unlikely it is in reality, can intimidate a complainant who would otherwise come forward with true, accurate and independently verifiable information about serious misconduct." (Report, p. 19.)

There are at least two significant concerns with providing discovery prior to the initiation of formal proceedings: (1) the potential for interference with the commission's investigation and intimidation of witnesses, and (2) the resulting substantial burden on the commission's resources. If discovery is provided before a judge responds to the staff inquiry or preliminary investigation letters, the judge will be informed of the source of the complaint and will be given witness statements. This is sure to have a chilling effect on the filing of complaints, as was the case in Alabama. Potential complainants, including judges, attorneys, litigants and court staff, are likely to be concerned about retaliation. Furthermore, witnesses who come in frequent contact with the judge may be reluctant to cooperate fully and candidly with commission staff knowing that their statements will be turned over to the judge. As previously noted, the Supreme Court has recognized that the commission's current rules limiting discovery to formal proceedings protect witnesses from intimidation. (*Ryan, supra*, 45 Cal.3d at pp. 527-528.) In the commission's view, CJA's proposal would impede the commission's ability to protect the public and pursue the truth in its investigations.

In addition to obliterating protection to those who come forward to bring misconduct to the commission's attention and those who cooperate with the commission during its investigations, CJA's discovery proposal would delay investigations and impose an undue burden on commission resources. Annually, it would require copying and mailing thousands of pages of documents, letters, and witness statements. Of the cases closed in 2011, staff inquiries were opened in 95 cases and preliminary investigations were opened in 77 cases. By contrast, formal proceedings were instituted in one case. CJA's proposal would result in a hundredfold increase in the disclosure of full discovery, including identities of thousands of complainants and witnesses.

In *Oberholzer*, the Supreme Court recognized the drain on commission resources that would result if full discovery were required prior to the issuance of formal proceedings. The court stated: "[Judge Oberholzer] does not address the possibility that the safeguards he seeks could have a detrimental impact upon the Commission's effectiveness by requiring a disproportionate use of the Commission's resources. [Citation.] ['[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurances that the action is just, may be outweighed by the cost.']" (*Oberholzer, supra,* 20 Cal.4th at pp. 393-394.) The Supreme Court concluded Judge Oberholzer failed to demonstrate that his interest in avoiding "this relatively mild form of discipline is sufficiently significant to justify the added time and expense of the safeguards he proposes." (*Id.* at p. 393.)

The Alabama Report previously discussed noted that the Alabama commission disclosure requirements, including a requirement that the commission provide updated disclosures, "result

in an unnecessary expenditure of time and resources to comply with these requirements – time and resources better spent investigating complaints." (Report, p. 22.)

In addition to the increased expenditure of commission resources, CJA's proposal would significantly delay the commission's process. It undoubtedly would result in frequent requests from counsel for extensions of time to review discovery before responding to the staff inquiry and preliminary investigation letters. Moreover, under CJA's proposal the commission would be required to supplement discovery when new information is received and to provide the judge with an additional 20 days to respond each time the commission furnishes additional discovery, resulting in further extensions and delays.

In the commission's view, the commission best fulfills its mandate to effectively and efficiently investigate complaints of judicial misconduct and protect the public while affording judges due process of law through its current practice of providing specificity of the allegations in staff inquiry and preliminary investigation letters and providing full discovery in formal proceedings.

IV. CJA Proposed Amendment to Rule 114(b) – Newly Discovered Evidence During the Appearance Process [3]

In response to CJA's proposed amendment to rule 114(b) concerning procedures for introduction of new information during the appearance process, the commission proposes amendments to rules 114(b) and 116(b). Based on our discussion with Judge Rubin and Judge Weiner, it is the commission's understanding that CJA's proposal is intended to eliminate current provisions which permit the commission, after investigating new evidence, to withdraw the intended admonishment and proceed with the preliminary investigation, and thereafter impose a higher level of discipline if warranted. CJA proposes that the level of discipline only be increased if the commission commences a new and separate staff inquiry or preliminary investigation based on the new information. The following proposed amendment to rules 114(b) and 116(b) reaches this same end but also allows the commission to consider new information learned from the investigation if the new information benefits the judge. In addition, the proposed amendment adds a ground for the introduction of new factual information – when the commission determines that consideration of the information is necessary to prevent a miscarriage of justice.

Commission's Proposed Amendment to Rules 114(b) and 116(b)

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An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or

[3] CJA's proposal addresses the appearance process for notices of intended private admonishments pursuant to rule 114(b). The commission proposes to amend both rule 114(b) and rule 116(b) (appearance process for notices of intended public admonishment).

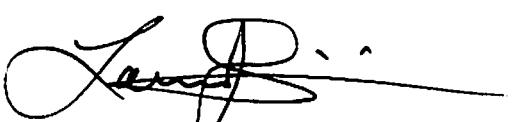
witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation; ~~or~~ (2) offered to correct an error of fact in the notice of intended private [public] admonishment*; or (3) is necessary to prevent a miscarriage of justice.*

To be considered under this rule, new factual information must be presented at the time the judge submits written objections to the proposed admonishment. When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information *before proceeding with its disposition pursuant to the appearance process. If this investigation discloses information of possible other misconduct, that information will not be considered in the disposition of the pending notice of intended [public] [private] admonishment but may be the subject of a new staff inquiry or preliminary investigation.* ~~Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section or withdraw the intended admonishment and proceed with the preliminary investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.~~

CONCLUSION

In considering CJA's proposals, the commission has endeavored to balance CJA's interests and the interest of the public in protection from judicial misconduct. In the commission's view, the proposed amendments benefit both the judiciary and the public by maintaining public trust and confidence in the integrity of the judiciary through a fair and effective judicial disciplinary system.

On behalf of the
Commission on Judicial Performance,



Lawrence J. Simi
Chairperson